IN THE CIRCUIT COURT OF STAFFORD COUNTY, VIRGINIA.

NORMAN BERRY *v.* BOARD OF SUPERVISORS OF STAFFORD COUNTY.

March Term, 1913.

(On March 20, 1913 the Supreme Court of Appeals affirmed the decision of the circuit court in this case by denying the petition of Norman Berry for an appeal).

1. Streets and Highways—Issuance of County Bonds for Road or Bridge Improvement under Act of February 25, 1910—Nature of Proceedings under Statute.—The proceeding under the Act of February 25, 1910, entitled "An Act to provide for the issuing of county bonds for permanent road or bridge improvement in the counties of the state," is ex parte, and the statute is mandatory upon the court so far as the making of the order is concerned. The usual rules of pleading do not apply in such proceeding.

2. Streets and Highways—Issuance of County Bonds for Road or Bridge Improvement under Act of February 25, 1910—Power of Court to Designate Roads and Bridges to Be Improved.—The Act of February 25, 1910, vests in the circuit court, and not in the petitioners, the power and authority to designate the roads and bridges to be macadamized or otherwise permanently improved.

3. Streets and Highways—Issuance of County Bonds for Road or Bridge Improvement under Act of February 25, 1910—Form and Requisites of Order for Election.—The order of the circuit court, made in pursuance of the Act of February 25, 1910, must fix the date of the election; must fix approximately the location, length and width of such roads as are proposed to be improved; must designate the location of such roads and bridges as are to be improved, and must designate the maximum amount of bonds to be issued for the purpose of such improvement.

On demurrer to bill in equity.

W. K. Goolrick, for the plaintiff.

G. B. Wallace, Commonwealth Attorney for Stafford County, for the Board of Supervisors.

F. M. Chichester, for the Farmers and Merchants State Bank of Fredericksburg.

The facts will be found sufficiently stated in the opinion of the court.

OPINION

R. H. L. CHICHESTER, J.: The question raised by the demurrer in this case involves the construction of the act of the

General Assembly of Virginia, approved February 25, 1910, entitled "An Act to provide for the issuing of county bonds for permanent road or bridge improvement in the counties of the state," and the specific question to be decided is, does the statute vest in the Court the power and authority to designate the roads and bridges to be macadamized or otherwise permanently improved, or is the authority vested in the petitioners, whether a majority of the Board of Supervisors, or 150 freeholders of the county. It is conceded that in all other respects the requirements of the statute were complied with. The petitioners in the case under consideration did undertake to recommend to the Court or to designate the roads to be improved and the demurrer admits of course all matters of fact properly pleaded and hence admits that the order of the Court varies, in so far as the roads to be improved are concerned, from the petition as set out in the bill.

Careful research has failed to show any decision, either of our own Supreme Court of Appeal, or of any other Court, bearing directly or indirectly on the proposition under consideration. As before intimated the decision of the question involved depends upon the construction to be put upon the Statute. This is an enabling statute, without it or one of like kind, the citizens of a county could not issue bonds for permanent improvement of their highways and bridges. The method of procedure therefore must be gathered from the statute itself. See 11 Cyc. 550.

In the consideration of this case we are only concerned with the first section of the statute which is as follows:

"Be it enacted by the general assembly of Virginia, That bonds may be issued by any county for the purpose of macadamizing or otherwise permanently improving the public roads and bridges of any county, upon the conditions hereinafter provided. The Circuit Court of the county, upon the petition of a majority of the board of supervisors of said county, or upon petition of one hundred and fifty freeholders of said county, shall make an order requiring the judges of election, at the next election of county officers, or at any other time not less than thirty days from the date of such order, which shall be designated therein, to open a poll and take the sense of the qualified voters of the county on the question whether the board of supervisors shall issue bonds for said purposes, or either of them; the approximate location, length and width of such roads as is proposed to be macadamized or permanently improved to be named in the order. The said order shall designate the location of such roads or bridges as are to be improved, and the maximum amount of bonds to be issued, which shall, including all bonds previously issued and remaining unpaid, in no case exceed an amount in excess of ten per centum

of the total taxable value at the time in the county, in which the road or roads are to be built or permanently improved."

There appears to be no ambiguity about the statute, no doubt as to what it means except upon the point at issue. Counsel for the complainant insisting that the language of the statute, "such roads as is proposed to be macadamized or permanently improved," refers by implication to roads designated in the petition of a majority of the Board of Supervisors or of one hundred and fifty freeholders of the county, while counsel for defendants insist that the statute does not contemplate the designation of the roads by the petitioners, and that if roads are designated in such a petition such designation is merely suggestive to the Court, and the language "as it proposes to be macadamized, etc.," refers to such roads as the Court designates in its order to be voted upon. As has been before intimated our Supreme Court of Appeals has not construed this statute and no case has been presented by either side to this controversy by any other Court construing a similar statute. Further more the history of legislation upon this subject in Virginia is of short duration. The first act upon the subject was passed by the legislature in 1904 (§ 944a (36) Code 1904). This act is almost identical with the act of 1910 under consideration. In the former act the Circuit Court ordered an election upon the petition of a majority of the Board of Supervisors only, and the words "shall order," are substituted in the later act in place of "may order," in the former. With the exception of some slight difference in verbiage other than as above indicated the acts are the same. Prior to the act of 1904, supra, by § 1243 of the Code 1887, the county court of any county, apparently without petition or suggestion from any source, was authorized to make an order for an election for subscription to the stock of Internal Improvement Companies Chartered by the General Assembly, as follows:

"The county court of any county, or the council of any city or town, may make an order requiring the sheriff or sergeant, and judges of election, at the next general election for state, city, town, county, or district officers, or at any other time, not less than thirty days from the date of said order, which shall be designated therein, to open a poll, and take the sense of the qualified voters on the question, whether the board of supervisors or council shall subscribe to the stock of any internal improvement company, named in the order, which has been incorporated by the General Assembly. The said order shall state the maximum amount proposed to be subscribed, which shall in no case exceed one-fifth of the total capital stock of said company, or an amount, the interest upon which, at the rate authorized by the council of any city or town, or board of supervisors of any county shall

not require the imposition of an annual tax in excess of twenty cents on the one hundred dollars."

This section of the Code 1887 (1243) was amended, Acts 1897-8, page 424, so far as the counties of Floyd, Carroll and Grayson were concerned, and in the amendment the action of the Court was predicated upon the request of the President or any two of the directors of the Blue Ridge Railroad Company. The Legislature of 1899-1900 again amended this section, by engrafting the amendment of 1897-8 upon the original act. This section 1243 was repealed by the legislature of 1904, at which session of the legislature the first act authorizing the issuance of County bonds for permanent road improvement was enacted. The similarity of language of § 1243 of the Code of 1887 and the similarity of purpose of this act to the act under consideration and its predecessor of 1904 indicate that the latter is an evolution of the former, and if this is true, the history of the present act dates back to the enactment of that statute, Acts 1870-1, p. 332. This act permitted counties to do indirectly, by subscription to stock of internal improvement companies, incorporated by the General Assembly, what the series of acts beginning in 1904 enabled them to do directly by the issuance of bonds, and the proceedings subsequent to the order under the act of 1870 providing for the conduct of the election canvassing the returns, contests, etc., were almost identical with proceedings prescribed in our present bond election statutes. Furthermore, the act of 1870 as amended was repealed at the same session of the legislature at which the first bond issue statute was enacted. I think therefore, that the evolution of the law which had its origin in 1870 should throw some light upon the power and authority of the Courts and petitioners respectively, in view of the apparent ambiguity of the statute of 1910, supra, upon this specific point.

It is manifest as indicated, supra, that whatever power, authority and duties vested in the petitioners, courts and voters is derived from the statute. The statute of 1870 as embodied in § 1243 of the Code of 1887, made no provision for a petition to move the court at all. So far as the statute provides, the county court acted of its own motion. It made an order for an election, it fixed the time, it stated upon which proposition the sense of the qualified voters was to be taken, it named the Internal Improvement Company whose stock was proposed to purchase. The order further was required to state the maximum amount *proposed to* be subscribed, etc. Here ended the duty and authority of the Court until the voters had passed on the proposition, and the obligation and privilege of purchasing or declining to purchase stock devolved upon the voters. It is not necessary to trace the further action necessary by the court in case the elec-

tion be carried, or the action by the Board of Supervisors, and the right of contest in the people, etc., which features are also embodied in the act of 1910 because the contest in this case only involves the question of the authority of the petitioners and Court respectively. The act of February 17, 1898, amending § 1243 of the Code 1887, to allow the counties of Floyd, Carroll and Grayson to subscribe to the capital stock of the Blue Ridge Railroad Company (which of course only applied to the counties named and to the capital stock of the Company named), for the first time provided a means of setting the machinery of the court in motion. There it is provided that the court may make and enter an order in all respects of course, except where it is made to conform to the specific requirements of the amendment, in conformity with § 1243 of the Code of 1887, upon the request of the president or any two of the directors of the Blue Ridge Railroad Company. I take it that this request was an informal affair, as a motion in the court by the President or directors, and that it appeared in the order simply that the request had been made. It was not contemplated that it should be in writing, and yet it was jurisdictional. The court had not power to make the order until the request was made by the president of the company, or two or more directors, as provided by the statute. I do not think it would be denied that, if the county court of Floyd County, for instance, had entered an order in conformity with the statute reciting that the order was entered upon request of the President of the Blue Ridge Railroad Company, an election held pursuant to such an order would be valid. Certainly the order of the court is the identical thing upon which the people vote. It is duly entered of record and is the notice to the voters of the proposition upon which they vote. The request of the president is merely an informal, though necessary preliminary to the entry of the order by the court. The court is supposed to set out in the order, and in order that a valid election be held, substantially all the essential requirements of the statute. Redd and others, *v.* Supervisors Henry County, 31 Grat. 695.

Now what if any, responsibility and power did the act of 1904 and subsequently the act of 1910, supra, relieve or deprive the Court of in this respect. We have shown that under the act of 1870, Code 1873, ch. 61, § 62, or § 1243, Code 1887, the court instituted the movement by its order. That by the amendment of 1897-8, so far as the counties therein named and in reference to the Internal Improvement Company therein named, the court acted upon the request of the president or two directors of the Company. In the acts of 1904 and 1910 it is provided that the court shall enter an order, etc., upon the petition of a majority of the Board of Supervisors of any county, or upon the petition

of one hundred and fifty freeholders of any county. What the petition should contain and what the order should contain, are dependent upon the statute. We have seen what the powers and responsibilities of the court were up to the present stage in the evolution of these statutes looking to, and providing for, internal improvement, and it is pertinent to now ascertain whether the statutes of 1904 and 1910 divested the court of any of that authority and power. These proceedings are ex parte in their nature. The usual rules of pleading do not apply. Taking the statute of 1870 as it appears in § 1243 of the Code of 1887, and the statute of 1910, vol. 3, Pollards Code, p. 164, and leaving out of consideration the intermediate acts, by comparison, we find that the only practical difference is that the former provided for subscription of counties to stock of Internal Improvements companies incorporated, the object of which is to build railroads, dig canals, make turnpikes or do any other thing looking to internal improvement, while the latter refers to county bond issues for permanent improvement of its highways, and under the former statute the Court entered the order for the election without any preliminary step, while in the latter a petition of a majority of the Board of Supervisors of the county, or one hundred and fifty freeholders is a necessary preliminary step. In the absence of express words in the statute or necessary implication from the language of the statute the court under the 1910 act, I take it, would have all the power and authority it had under the act of 1870 and acts subsequent thereto. One thing is clear, the statutes of 1904 and 1910 deprive the Court of the power to institute the proceedings of its own motion, but wherein does the statute 1910 further infringe upon the authority and responsibility of the court.

Let us analyze § 1 of the act and see.

Its first clause enables any county in Virginia to issue bonds for the purpose of macadamizing or otherwise permanently improving the public roads and bridges of any county upon conditions thereinafter provided. The act then provides that the Circuit Court of the county, upon petition of a majority of the Board of Supervisors *or* upon petition of one hundred and fifty freeholders of said county shall make an order, etc. This is the only reference in the statute to the petition, the means of putting the court in motion. It is evidently contemplated by the legislature that the only object of the petition is to start the machinery of the court. It has no other function. That it was expected to be informal is manifest by the fact that it could be signed by either a majority of the Board of Supervisors or one hundred and fifty freeholders, neither of whom could by any peradventure know or represent the wishes or desires of a majority of the

qualified voters or freeholders, or tax payers of the county, and by the further fact that nowhere in the statute does it directly appear what the petition shall contain, or that it shall contain any recommendation to the court whatever, other than by implication, a prayer that the court shall make an order to take the sense of the qualified voters of the county upon the question as to whether the Board of Supervisors of the county, shall issue bonds for macadamizing or otherwise permanently improving the roads and bridges of the county as designated in the order to be entered.

When it comes to dealing with the order of the court the statute is very explicit. It definitely sets out what the order shall contain. The order fixes the date of the election by express terms of the statute; the order fixes approximately the location, length, and width of such roads as are proposed to be improved, and designates the location of such roads and bridges as are to be improved, and the maximum amount of bonds to be issued.

But counsel for complainant argues that the language of the statute "the approximate location, length and width of such roads as is proposed to be macadamized, etc.," indicates that the particular roads to be improved are proposed in the petition and the court can designate no others. If this is so, remembering the history of this legislation, why did not the legislature say so? Why did not the legislature add after the word proposed, the words "by the petitioners," or "in the petition?" Or better still, in that part of the act referring to the petition why did not the legislature say, "The Circuit Court of the county upon the petition of a majority of the Board of Supervisors, or upon petition of one hundred and fifty freeholders, of said county, designating the roads to be macadamized, etc." In my opinion the legislature didn't do it because they didn't intend that a majority of the Board of Supervisors of any county, or one hundred and fifty freeholders out of a possible two thousand in any county should unalterably fix and designate the highways which should be permanently improved with money from the pockets of *all* the tax payers of the county. I believe the legislature left the designation of the particular roads to the court, the court to inform itself by mass meeting, as was done in this case, or otherwise, in order that the best interests and advancement of the county might be subserved, and to prevent the manifold injustices which might result were the petitioners the sole arbiters of the specific roads to be improved. One hundred and fifty freeholders may come from one district or one section of a county and all or practically all the roads proposed by the petition may be located in that section or where the petitioners would derive all the benefit to the exclusion of the other taxpayers. This was largely true of the

roads suggested in the petition in the case at bar. Such action upon such a construction of the act, would result in one of two things. In the event the election carried, a gross and irretrievable injustice would be done a vast majority of the tax payers, or a most desirable progressive movement would be defeated with no opportunity for another election for one or two years, and then the ever recurring opportunity of a repetition of the injustice. If we admit that there is doubt, for the sake of argument, as to the intention of the legislature here, it is a fundamental principle of law that, whenever a statute is capable of two constructions one of which would work manifest injustice and the other would work no injustice, it is the duty of the court to adopt the latter as it can scarcely be presumed that an injustice was in the legislative intent. Immigration Society *v.* Com., 103 Va. 46; Dickey *v.* Smith, 42 W. Va. 805.

I think the language, "such roads as is proposed to be macadamized, etc.," refers to the roads set out and proposed to be macadamized in the Court's order. This construction of the statute does not preclude the suggestion of roads or a system of roads in the petition or the adoption of the roads suggested by the petitioners by the Court, but on the other hand it gives to the tax payers whether they have had an opportunity to sign the petition or not, the opportunity to suggest to the court any changes in the roads as suggested, or additional roads not mentioned in the petition which may be of infinite importance to such tax payers if not to the petitioners. It must be remembered that the proceeding under this statute is ex parte and that the statute is mandatory upon the court so far as the making of the order is concerned. What redress have the ninety and nine tax payers against the one petitioner if they may not be heard on the vital matter of roads to be improved.

The object of the statute was to promote progress. The presence of improved roads in any community is the index of progress, and the statute of 1904 was enacted at a time when the real spirit of progress took root in the minds and hearts of the Virginia people. It could hardly be suggested that the legislature would put it in the power of any one hundred and fifty freeholders to forever postpone this progress or to work a gross injustice to the majority. In searching for the intention of the legislature it is the duty of the court to consider the object of the statute and the purpose to be accomplished. Funkhouser *v.* Spahr, 102 Va. 306, 312, 46 S. E. 378; Ryan *v.* Krise, 89 Va. 728, 733, 17 S. E. 128; Sherwood *v.* Atlantic, etc., R. Co., 94 Va. 291, 26 S. E. 943; Offield *v.* Davis, 100 Va. 250, 40 S. E. 910; Orange, etc., R. Co. *v.* Alexandria, 17 Grat. 176; Fox *v.* Com., 16 Grat. 1; Humphreys *v.* Norfolk, 25 Grat. 97, 100; Altmeyer *v.* Caulfield, 37 W. Va. 847, 17 S. E. 409.

The effect and consequence of a statute must also be regarded in interpreting it. Altmeyer *v.* Caulfield, 37 W. Va. 847, 17 S. E. 409.

I repeat that the history of legislation upon this subject indicated that the Court was and is vested with full power to fix and designate in the order everything to be voted upon by the qualified voters. The rule of law is that all former statutes on the same subject *whether repealed* or unrepealed, may be considered in construing provisions or statutes that remain in force. Daniel *v.* Simms, 49 W. Va. 554, 39 S. E. 690; Curran *v.* Owens, 15 W. Va. 208. Applying this rule to the statute under consideration as has been heretofore in this opinion done, and particularly now as to the language which the learned counsel for complainant urges, gives to the petitioners the right to name and designate the roads to be macadamized, "such road as is proposed to be macadamized," etc. Let us see if we get any suggestion as to their meaning. Sec. 1243, Code 1887, which was the act of 1870-1, as has been before noted, provides for no petition or other preliminary to move the Court to enter the order, and yet in that part of the statute setting out what the courts order shall contain, this significant language appears, "the said order shall state the maximum amount *proposed* to be subscribed," etc. *Proposed* by what or by whom? Manifestly by the court's order, because nothing else had been done and nothing else was provided for by the statute up to that stage of the proceedings but the entry of the order of the court. If the amount *proposed* in the act of 1870 referred to the order, why does not "*roads proposed*" in the act 1910 refer to the court order also. I think the answer must undoubtedly be, in the light of every valid reason, that such was the intention of the legislature. Indeed I think the draftsman of the act of 1904 must have had the act of 1870 before him when he drew the act and this accounts for the similarity of the language used and this is particularly significant so far as it relates to the construction of the meaning of the word "proposed" in the 1910 act.

In sustaining the demurrer to the bill therefore, I feel that I am but giving effect to the manifest intent of the legislature, which is the primary object to be attained in the interpretation of statutes.

Note.

It is through the courtesy of William W. Butzner, Commonwealth Attorney, for the city of Fredericksburg, Va., that we are enabled to publish in this issue the foregoing opinion.